



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

October 21, 1992

Mr. Jack W. Garrison  
Acting Executive Director  
Texas Department of Licensing  
and Regulation  
P.O. Box 12157  
Austin, Texas 78711

Letter Opinion No. 92-69

Re: Disposition of interest earned  
on the auctioneer education and  
recovery fund (ID# 16943)

Dear Mr. Garrison:

On behalf of the Texas Commission of Licensing and Regulation you request advice about the law regulating auctioneers.<sup>1</sup> V.T.C.S. art. 8700; *see* V.T.C.S. art. 9100 (Department of Licensing and Regulation). You first ask whether the auctioneer education and recovery fund has been placed in the treasury, so that an appropriation is necessary to withdraw it.

The auctioneer education and recovery fund was established for the payment of claims against auctioneers brought by aggrieved consumers of auctioneer services. V.T.C.S. art. 8700, §§ 5A, 5C. The fund consists of fees paid by licensees and reimbursements by auctioneers on whose account a claim is paid from the fund. *Id.* §§ 5A(b), (c); 5C(h). Funds in excess of \$250,000 may be used by the commissioner to provide educational programs for licensees. *Id.* § 5A(g). Section 5A provides in part:

(a) The auctioneer education and recovery fund is established *as a special trust fund with the state treasurer* administered by the department, without appropriation, for the payment of claims against auctioneers licensed under this Act.

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<sup>1</sup>The Texas Department of Licensing is the primary state agency responsible for oversight of regulated businesses, industries, general trades, and occupations, as assigned by the legislature. V.T.C.S. art. 9100, § 2(a). The department is governed by the Texas Commission of Licensing and Regulation and the commissioner of licensing and regulation, who is appointed by the commission. *Id.*, §§ 2(b); 13.

(d) The fees received under this section shall be deposited in the education and recovery fund and held by the commissioner in trust for implementing the purpose of the fund. Those amounts may be invested and reinvested in the same manner as funds of the Employees Retirement System of Texas, and *the income from the investments shall be deposited to the credit of the fund.*

*Id.* §§ 5A(a), (g) [emphasis added].

You first ask whether this fund is a trust fund that may be held outside of the treasury and expended without a legislative appropriation. Article VIII, section 6 of the Texas Constitution provides in part:

No money shall be drawn from the Treasury but in pursuance of specific appropriations made by law.

Once funds are placed in the treasury, they cannot be withdrawn except by appropriation by the legislature. The State Funds Reform Act, codified at sections 404.091 through 404.095 of the Government Code, places many of the funds received by state agencies in the treasury. Certain funds are excepted from this requirement, including "funds held in trust or escrow for the benefit of a person or entity other than a state agency." Gov't Code § 404.093. This provision codifies a common law rule that a "trust fund" may be held by the treasurer as a special fund outside of the treasury and may be expended without legislative appropriation. *Friedman v. American Surety Co. of New York*, 151 S.W.2d 570 (Tex. 1941); Attorney General Opinions JM-772 (1987) at 6, n.3; WW-122 (1957). *See generally* Letter Advisory No. 132 (1977) (discussing trust fund doctrine at length and constitutional issues concerning appropriation process). Such funds "do not belong to the state in its sovereign capacity" but are for the benefit of the group for which they are held. *Friedman*, 151 S.W.2d 579; *see, e.g.*, Attorney General Opinions JM-539 (1986) (sales taxes collected by comptroller on behalf of local taxing units are trust funds); MW-454 (1982) (patient benefit funds of Department of Mental Health and Mental Retardation are trust funds); H-1040 (1977) (state employees' contributions for group insurance coverage are trust funds); WW-565 (1959) (assets of the Employees Retirement System are trust funds). This office has established the following test for determining whether a particular fund constitutes a trust fund:

the assets in question should reflect, among other things, (1) that they are administered by a trustee or trustees, (2) that the assets are neither granted to the state in its sovereign capacity nor collected for the general operation of state government, and (3) that they are to be spent and invested for specific, limited purposes and for the benefit of a specific group of individuals.

Attorney General Opinion JM-300 (1985) at 2.

The legislature expressly intended to establish the auctioneer education and recovery fund as a trust fund, describing it as "a special trust fund with the state treasurer,"<sup>2</sup> to be administered "without appropriation."<sup>3</sup> V.T.C.S. art. 8700, § 5A(a). The fund moreover exhibits characteristics of a trust fund. It is held in trust by the commissioner of licensing and regulation, and its assets up to \$250,000 are to be used to reimburse consumers for damages resulting from violations of contracts with auctioneers. This part of the fund is held for limited purposes and for the benefit of a limited group of people.

A more difficult question is raised by the funds in excess of \$250,000, which are to be used for the education of licensed auctioneers. *Id.* §§ 5A(g); 5B. It has been argued that these funds may be used for operational purposes of the agency and are therefore not trust funds. An evaluation of the provisions governing the use of funds in excess of \$250,000 is therefore necessary.

The commissioner of the Department of Licensing and Regulation has authority to "recognize, prepare, or administer continuing education programs for licensees." *Id.* § 3B. Participation in these programs is voluntary. *Id.* The assets of the auctioneer education and recovery fund in excess of \$250,000 may be used to:

- (1) implement the advancement of education and research in the auctioneering profession *for the benefit of*

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<sup>2</sup> Funds deposited *with* the treasurer are to be held by the treasurer as a special trust fund outside the treasury, in contrast to funds deposited *in* the state treasury. Attorney General Opinion WW-122 (1957) at 5.

<sup>3</sup>Although the auctioneer education and recovery fund may be disbursed without an appropriation, the current general appropriation act appropriates revenues placed in the fund to the Department of Licensing and Regulation. Acts 1991, 72 Leg., 1st C.S., ch. 19, at 546.

*those licensed under this section and the improvement and increased efficiency of the industry;*

(2) underwrite educational seminars, training centers, and other forms of educational projects *for the use and benefit of licensees;*

(3) sponsor, contract, and underwrite all other educational and research projects *advancing the auctioneer profession in this state;* and

(4) cooperate with associations of auctioneers and other groups *for the education and advancement of the auctioneer profession in this state.*

*Id.* § 5A(g) [emphasis added].

An Auctioneer Education Advisory Board has been established to advise the commissioner on educational matters. The advisory board

shall evaluate educational programs, seminars, and training projects and make recommendations to the commissioner on their usefulness and merit as continuing education tools. On the recommendation of the advisory board, the commissioner may fund or underwrite specific classes, seminars, or events *for the education and advancement of the auctioneer profession in this state.*

*Id.* § 5B(j) [emphasis added].

Under these provisions, the funds in excess of \$250,000 may be used in ways that actually benefit the individual licensed auctioneers,<sup>4</sup> for example, by spending the funds to provide written educational materials or continuing education courses for them. Moreover, since the legislature established the auctioneer recovery and educational fund as a special trust fund, we believe the provisions describing the educational uses of the fund must be construed narrowly, as authorizing only those

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<sup>4</sup>Licensed auctioneers constitute a specific group of individuals, and, although they are regulated by a state agency, they do not constitute the state agency.

educational projects designed to educate individual auctioneers. Subject to this construction, the auctioneer education and recovery fund may be used for the purposes stated in section 5A of article 8700, V.T.C.S., without going through the appropriation process.<sup>5</sup>

You next ask about the disposition of interest earned on deposits of the fund in state depository banks. See Gov't Code §§ 404.021 *et seq.* You wish to know whether the interest must be placed in the general revenue fund pursuant to section 404.071 of the Government Code. Section 404.071 provides in part:

(a) Interest received from investments<sup>6</sup> of money in funds and accounts in the charge of the treasurer shall be allocated on a monthly basis as follows:

(1) the pro rata portion of the interest received due to each constitutional fund shall be credited to that fund; and

(2) the remainder of the interest received . . . shall be credited to the general revenue fund.

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(d) The treasurer is entitled to rely on the opinion and advice of the attorney general for the proper interpretation and application of this section.

Gov't Code § 404.071 (a), (d) [footnote added].

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<sup>5</sup>[F]unds set apart out of earnings derived from investment of funds held in trust for others, as administrative expenses of the trustee agency" are not required to be placed in the treasury. Gov't Code § 404.093(b)(3); Attorney General Opinion MW-454 (1982) at 2.

<sup>6</sup>The original version of section 404.071(a)(1) referred to "interest received from *time deposits* of money in funds and accounts in the charge of the treasurer." V.T.C.S. art. 2543d (1925); Acts 1969, 61st Leg., ch. 885, § 1 at 2703. The language was amended to substitute the term "investments" for "time deposits," because of legislation authorizing the treasurer to invest in interest-bearing investments other than time deposit accounts. Gov't Code § 404.071 revisor's note; see Gov't Code § 404.024(a) (authorizing deposit of state funds in state depositories and investment of state funds in specified investments).

Subpart (a)(1) of section 404.071 implements the constitutional requirement that interest on funds constitutionally dedicated to a special purpose may be spent only for that special purpose. Tex. Const. art. VIII, § 7; *Lawson v. Baker*, 220 S.W. 260, 272 (Tex. Civ. App.--Austin 1920, writ ref'd). The interest on special funds established by statute is ordinarily credited to the general revenue fund, but a different rule applies to trust funds held by the treasurer. Interest on such trust funds becomes part of the principal and is therefore credited to the trust fund. Attorney General Opinions JM-539 (1986); M-468 (1969). The auctioneer recovery and education fund is a trust fund; accordingly, the depository interest is credited to it and not to the general revenue fund.

### S U M M A R Y

The auctioneer education and recovery fund is a trust fund, which does not have to be placed in the treasury. Interest earned on the deposit of the fund in a state depository bank is credited to the fund and not to the general revenue fund.

Yours very truly,

A handwritten signature in cursive script that reads "Susan Garrison".

Susan Garrison  
Assistant Attorney General  
Opinion Committee